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No. 99-6723

Supreme Court, U.S.
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In The

Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

v.

MICHAEL MOORE, Secretary,
Florida Department of Corrections,

Respondent.

On Writ Of Certiorari To The Florida Supreme Court

BRIEF FOR PETITIONER

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CAPITAL CASE
QUESTIONS PRESENTED

1. Did the Florida Supreme Court's appraisal of the likelihood that Mr. Bryan will suffer needless agony and degradation when he is put to death by Florida's electric chair violate the Eighth Amendment by disregarding a constitutionally unacceptable risk of physical violence, disfigurement and torment?

2. Did the Florida Supreme Court err in concluding that the record as a whole insufficiently sustains Mr. Bryan's contention that his execution by Florida's electric chair unnecessarily exposes him to physical suffering and degradation in violation of the Eighth Amendment?

3. Following the documented, repeated malfunctioning of Florida's electric chair, resulting in ghastly spectacles of violent disfigurement, did the Florida Supreme Court err in rejecting Mr. Bryan's contention that his being subjected to execution by such means constitutes wanton psychological and moral cruelty that violates the Eighth Amendment?

4. Did the Florida Supreme Court err in determining that the presence or absence of conscious pain once electrocution begins is the only factor which determines whether or not Florida's electric chair constitutes cruel and unusual punishment under the Eighth Amendment?

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BRIEF FOR PETITIONER

OPINION BELOW

The unpublished order of the Florida Supreme Court was entered on October 20, 1999, and is reprinted in the Joint Appendix (hereinafter "J.A.") at page 6. The opinion of the Florida Supreme Court in *Provenzano v. Moore* is reported at 1999 WL 756012 (Fla. Sept. 24, 1999) and the slip opinion, which will be cited in this brief, is reprinted in the Joint Appendix (hereinafter "J.A.") at pages 47-132.

JURISDICTION

The Florida Supreme Court entered its judgment on October 20, 1999. The petition for certiorari was filed on October 21, 1999, and granted on October 26, 1999. *Bryan v. Moore*, 120 S.Ct. 394 (1999). This Court has jurisdiction under 28 U.S.C. § 1257(a), petitioner having asserted rights under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution, which provide in relevant part:

> "[N]or [shall] cruel and unusual punishments [be] inflicted."

U.S. Const. amend. VIII.

> "No State shall . . . deprive any person of life [or] liberty . . . without due process of law.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. THE SERIES OF EVENTS GIVING RISE TO THESE PROCEEDINGS

As current was applied during Florida's 1990 electrocution of Jesse Tafero, flame and smoke shot up around his head (R3.42). When the electricity was turned off, Mr. Tafero's head was "nodding back and forth." His chest "was moving in." He seemed "to be gasping for air." A leg moved (R3.43, Pet. Ex. 24, No. 40).[1] The attending physician reported that "spasmodic respiratory sounds were audible" (*Id.*). The electricity was turned back on.

Again flames and smoke rose from Mr. Tafero's head (R3.43-44). When the electricity was turned off, Mr. Tafero's head was nodding (R3.44). There "appeared to be a couple of deep breaths from Tafero" (R3. Pet. Ex. 24, No. 40). The physician reported that "spasmodic respiratory sounds produced oral and nasal fluid gurgling" (*Id.*). The electricity was turned on again.

Again flames and smoke shot up (R3.44-45). Now, when the electricity ceased, Tafero was still (R3.45). What had happened was to be a subject of controversy that would capture increasing judicial concern over the next decade. "According to Robert H. Kirschner, M.D., Tafero

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[1] Citations in this brief are as follows: "R1. V[olume #]." refers to the April 1997 hearing in *Jones v. Butterworth*, 695 So. 2d 679 (Fla. 1997), which is not consecutively paginated. "R2." refers to the July 1997 hearing in *Jones v. State*, 701 So. 2d 76 (Fla. 1997). "R3." refers to the July 1999 hearing in *Provenzano v. Moore*, ___ So. 2d ___ (Fla. Sept. 24, 1999). Both "R2." and "R3." are consecutively paginated. Exhibits are designated by the appropriate record and exhibit number, with "Pet. Ex." referring to Petitioner's exhibits and "St. Ex." referring to State's exhibits. For example, "R3. Pet. Ex. 1" refers to Petitioner's Exhibit 1 in the July 1999 Provenzano hearing.

was not dead until the third jolt of electricity was administered and may have remained conscious during the first and second jolts." *Buenoano v. State*, 565 So. 2d 309, 315 (Fla. 1990) (Kogan, J., dissenting). Visibly, Mr. Tafero's head "was burned and charred, his face was seared by flames, and his eyebrows, eyelashes, and facial hair were burned." *Jones v. State*, 701 So. 2d 76, 87 (Fla. 1997) (Shaw, J., dissenting).

During Florida's 1997 electrocution of Pedro Medina, first smoke and then flame rose from Mr. Medina's head (R3.78-79). The flames flared up 6 to 12 inches; the smoke filled the chamber (R1. V3. 82, 86; R2.265, 282, 289). There was no visible reaction by the execution team (R1. V8. 103). The prison superintendent said, "Proceed" (*Id.* at 144). After the electricity was turned off, Mr. Medina "took a gasping breath. There was an interval, he took a second gasping breath. There was another interval of some seconds, and he took the . . . third gasping breath. And after that third breath, I could see his body slumped" (R3.83). Mr. Medina's head "was burned and charred and his face was scalded." *Jones*, 701 So. 2d at 87 (Shaw, J., dissenting).

Allen Lee Davis was seated in Florida's electric chair in July, 1999. After all of the apparatus was affixed to Mr. Davis, witnesses heard him make two separate sounds described as "screams," "yells," "moans," "high-pitched murmurs," "squeals" or "groans" (R3.162-63, 197, 217, 278, 280, 290, 706, 721-22), or like "a scream with someone having something over their – their mouth. It obviously was a great degree of anguish associated with it from the sound of it" (R3.181). Members of the execution team who heard these sounds ignored them because they were not unusual during an electrocution (R3.330-31, 358-59, 398-99). Before the current was turned on, the one team member who could see under the mask covering Mr.

Davis' face observed blood in Mr. Davis' left nostril but did not alert anyone because "it wasn't nothing but a nosebleed" (R3.327-28). Seconds after Mr. Davis' body tensed under electricity, witnesses saw blood coming from beneath the mask, dripping down onto Mr. Davis' collar, a pool of blood beginning to form a dinner-plate-sized stain on his shirt (R3.166-68). After Mr. Davis' body stopped tensing, witnesses saw his chest move "back and forth several times" (R3.168, 222). Post-execution photographs of Davis showed an "unquestionably violent" and "ghastly" scene. *Provenzano v. Moore*, ___ So. 2d ___ (Fla. Sept. 24, 1999), slip op. at 52-53 (Shaw, J., dissenting). *See* R3. Pet. Ex. 1.

Following Jesse Tafero's fiery execution, Judy Buenoano challenged Florida's electrocution process as a cruel and unusual punishment. *Buenoano v. State*, 565 So. 2d 309 (Fla. 1990). The Florida Supreme Court noted that the Florida Department of Corrections ["DOC"] had "determined that [in the Tafero execution] for the first time a synthetic, rather than a natural, sponge had been used in the headpiece" and "that the burning of the sponge caused the flames and smoke." *Id.* at 311. The court "presumed that members of the executive branch will properly perform their duties" regarding carrying out death sentences, ruled that the Tafero mishap did not "justif[y] judicial interference with the executive function," and held, "[d]eath by electrocution is not cruel and unusual punishment, and one malfunction is not sufficient to justify a judicial inquiry into the Department of Corrections' competence." *Id.* Three justices dissented, arguing that an evidentiary hearing should be ordered. *Id.* at 311-15.

The Medina execution thereafter attracted renewed attention. But not all agreed that serious concern was warranted. Attorney General Butterworth commented

that "People who wish to commit murder, they better not do it in the state of Florida because we may have a problem with our electric chair." Ron Word, *Execution Fire Stirs Dispute: Electric Chair Woes Could Delay Sentences*, Fla. Times-Union, March 26, 1997, at A1. Florida Senate Majority Leader Locke Burt stated that the alternative of lethal injection "appears to be a medical procedure and a painless death is not punishment. I think it's important that there is a deterrent and a punishment element." Jackie Halifax, *Execution Method Debated: Legislators Defend Electrocution*, Fla. Times-Union, March 27, 1997, at B7. Victor Crist, House Justice Council Chair, remarked, "There is only one method that is sure and painless, and that is the guillotine." Word, *supra*, at A1. DOC Secretary Singletary observed, "It's not a perfect world. We sent the space shuttle up and blew it up. Do we stop that? It's not a perfect world when human beings are involved." Jeffrey Brainard, *Faulty Execution Renews Debate: Governor Orders an Investigation Into What Went Wrong With the Chair After Flames Erupt From the Inmate*, St. Petersburg Times, March 26, 1997, at 11A. State Senator Charlie Crist concluded that "obviously the thing works. It did what it was designed to do. It put [Medina] to death." Peter Wallsten, *Medina Felt No Pain, Say Doctors*, St. Petersburg Times, April 1, 1997, at 5B. Alan Gutman, Chair of the Senate Criminal Justice Committee commented: "[A]ll those in Florida understand that if they kill someone, they're going to go through the same process." *Id.*

Following Pedro Medina's fiery execution, Leo Jones challenged Florida's electrocution process as cruel and unusual punishment. *Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997). The Florida Supreme Court dismissed Jones' "claim that execution by electrocution is unconstitutional per se" as procedurally barred, but "[d]ue to the fact that

flames have erupted on two occasions during electrocutions conducted in Florida's electric chair," it ordered an evidentiary hearing on whether "electrocution in Florida's electric chair in its present condition is cruel or unusual punishment." *Id.* at 482. Three justices dissented, saying that the scope of the hearing should not be restricted. *Id.*

A first (April 1997) hearing in the *Jones* case was found to be inadequate, and the Florida Supreme Court ordered another, *Jones v. Butterworth*, 695 So. 2d 679 (Fla. 1997), while "reiterat[ing] that the sole issue to be determined is whether or not electrocution in Florida's electric chair in its present condition is cruel or unusual punishment." *Id.* at 681. At the second (July 1997) hearing, Jones presented expert witnesses in forensic pathology, neurophysiology, neurology and electrical engineering, as well as additional lay witnesses to executions, and the State presented additional medical and engineering witnesses. The trial court found: the flame and smoke during Medina's execution were caused by an improperly moistened sponge in the headpiece and this problem had been fixed; "Medina's brain was instantly and massively depolarized within milliseconds of the initial surge of electricity"; DOC had adopted written testing and electrocution procedures; the electric chair was in "excellent condition"; prison staff were "qualified and competent to carry out executions"; and "[a]ll inmates who will hereafter be executed in Florida's electric chair will suffer no conscious pain." *Jones v. State*, 701 So. 2d 76, 77 (Fla. 1997). The trial court concluded as a matter of law that:

> (1) Cruel or unusual punishment is defined by the Court as the wanton infliction of unnecessary pain.
>
> (2) Florida's electric chair, in past executions, did not wantonly inflict unnecessary pain

> and therefore did not constitute cruel or unusual punishment.
>
> (3) Florida's electric chair, as it is to be employed in future executions pursuant to the Department of Correction's written testing procedures and execution day procedures, will result in death without inflicting wanton and unnecessary pain, and therefore, will not constitute cruel or unusual punishment.
>
> (4) Florida's electric chair in its present condition does not constitute cruel or unusual punishment.

Jones, 701 So. 2d at 77-78 (citations omitted). The Florida Supreme Court rejected Jones' argument that a proper analysis of his constitutional claim had to consider whether electrocution involved an impermissible *risk* of pain, holding that "[i]n order for a punishment to constitute cruel or unusual punishment, it must involve torture or a lingering death or the infliction of unnecessary and wanton pain." *Id.* at 79 (internal quotation marks and citations omitted). Concluding "[t]here was substantial evidence presented in this case that executions in Florida are conducted without any pain whatsoever," *Id.* at 79, and finding "competent substantial evidence" to support the trial court's order, the Florida Supreme Court held, "electrocution in Florida's electric chair in its present condition is not cruel or unusual punishment." *Id.* at 80.

Thomas Provenzano's execution was scheduled for the day following Allen Davis' bloody execution in 1999. On Mr. Provenzano's petition, the Florida Supreme Court stayed his execution, allowed amendment of his bare-bones petition, and ordered an evidentiary hearing on the amended petition. *Provenzano v. Moore*, 737 So. 2d 551 (Fla. 1999). At this (July 1999) hearing, evidence was received regarding Florida's electrocution procedure, the use of electrocution as a mode of execution in the United

States, and scientific analyses of electrocution as used for this purpose.

The trial court concluded that the electric chair functioned as intended in the Davis execution; that the Davis execution did not violate the DOC's written procedures; that Davis did not die of asphyxiation from the mouth strap; that Davis underwent instant and painless death once the current was applied; that the nose bleed began before the current was applied and was not caused by the current; that the straps may have caused Davis discomfort but not unnecessary and wanton pain; that the mouth strap is not part of the electrical operation of the electric chair; that a redesigned mouth strap could accomplish the same purpose as the present one; and that any pain associated with the straps "is necessary to ensure that the integrity of the execution process is maintained" (R3.2297-98). Ultimately the trial court held that: "Execution by electrocution in Florida's electric chair as it exists in its present condition as applied [sic] does not constitute cruel or unusual punishment, and therefore, is not unconstitutional" (R3.2298).

By a vote of 4 to 3, the Florida Supreme Court affirmed, holding that "Florida's electric chair is not cruel or unusual punishment." *Provenzano v. Moore*, ___ So. 2d ___ (Fla. Sept. 24, 1999), slip op. at 5. The appellate court made no factual findings of its own but deferred to the trial court's conclusions under the state-law "competent substantial evidence" standard. *Id.* at 4-5. All four justices in the majority, however, urged the Legislature to adopt the alternative of lethal injection. *Id.* at 9 (Harding, C.J., joined by Lewis, J., specially concurring); *id.* at 15 (Wells, J., joined by Quince, J., concurring). The three dissenting justices argued that the majority had applied a flawed constitutional standard to Mr. Provenzano's claim. *Id.* at

24 (Shaw, J., dissenting); *id.* at 68 (Anstead, J., dissenting); *id.* at 72 (Pariente, J., dissenting).

When Florida scheduled Anthony Bryan to be executed, he filed a petition in the Florida Supreme Court challenging his imminent execution by electrocution. Mr. Bryan asked that the court adopt and consider the records in *Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997), *Jones v. Butterworth*, 695 So. 2d 679 (Fla. 1997), *Jones v. State*, 701 So. 2d 76 (Fla. 1997), *Provenzano v. State*, Fla. Sup. Ct. No. 95,849, and *Provenzano v. Moore*, Fla. Sup. Ct. No. 95,973, in adjudicating his petition. He alleged that his execution by electrocution would violate the Eighth Amendment in that he would be subjected to an unconstitutional risk of suffering, degradation, physical violence, disfigurement, mutilation, pain, and lingering death in a number of ways: through the forceful strapping procedure; through the State's employees' ignoring his moans, screams, bleeding or partial asphyxiation; through burning from fire, scalding and/or electricity, not only at the electrode points but on his face, forehead, groin, genitals and pubic region; through violent convulsions as electricity reaches his body tissues; through the failure of the electricity to render him instantly insensible; through unpredictable human errors in placing the head and leg electrodes; through other unanticipated malfunctions; through being made the subject of a ghastly display; and through the psychological torment of awaiting his execution with awareness of all these possibilities (Petition at 3-10).

On October 20, 1999, the Florida Supreme Court granted Mr. Bryan's motion to adopt the records and take judicial notice of the several *Jones* and *Provenzano* proceedings. Pursuant to its opinion in *Provenzano*, it denied Mr. Bryan's petition on the merits. This Court granted certiorari.

B. THE PRACTICE OF ELECTROCUTION AS A METHOD OF EXECUTION

Twenty-six states at one time authorized execution by judicial electrocution (R3. Pet. Ex. E at 4). Of the twenty-six, twenty-two have now abandoned electrocution completely or as the sole method of execution.[2] No State has adopted judicial electrocution since 1949.[3] Thus, at present, among the thirty-eight States that still use capital punishment,[4] only four – Florida, Alabama, Georgia, and Nebraska – mandate judicial electrocution as the mode of killing. No jurisdiction outside the United States uses judicial electrocution to administer capital punishment.[5]

The Florida Corrections Commission analyzes the status of Florida's corrections system and recommends changes in that system to the Governor and Legislature. Fla. Stat. § 20.315(4)(b)(2) (1995). In 1997, after the Medina execution, the Commission conducted a survey of execution methods in other states and presented its findings and recommendations in *Supplemental Report: Execution Methods Used By States* (J.A. 144-238; R3. Pet. Ex. E). The Commission recommended that Florida enact legislation allowing lethal injection as an alternative to electrocution for persons currently on death row and as the sole method for those sentenced to death after the legislation

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[2] R3. Pet. Ex. E at 4 (in 1997, six states used electrocution as the sole means of execution); R3. Pet. Exs. A, B (by 1999, Tennessee and Kentucky had also abandoned electrocution).

[3] *Provenzano v. Moore*, slip op. at 56 (Shaw, J., dissenting); 1949 W. VA. ACTS 37 (West Virginia in 1949, was the last state to adopt judicial electrocution).

[4] R3. Pet. Ex. E at 7.

[5] *Provenzano v. Moore*, slip op. at 56-57, 67 (Shaw, J., dissenting).

became law (*Id.* at 28). In preparing its report, the Commission conducted a telephone survey of seventeen States to discuss their methods of execution (R3. Pet. Ex. E at 8). If a State had changed from electrocution to lethal injection, its officials were asked what prompted the change (*Id.* at 9). The most common reason given was that lethal injection was considered a "more humane method of execution" (*Id.* at 10).

C. VIOLENCE, MUTILATION AND PHYSICAL INDIGNITY

Neither the trial courts nor the Florida Supreme Court have addressed Bryan's contention that electrocution violates the Eighth Amendment because of its violence, mutilation of the body and visible barbarity. Dissenters on the Florida Supreme Court have noted the majority's failure to address these issues. *Provenzano v. Moore*, slip op. at 24 (Shaw, J., dissenting) (in *Jones*, "[t]he Court did not address violence or mutilation"); *id.* at 25 (the trial court in *Provenzano* "did not address the issues of violence or mutilation or the overall record of electrocution as a method of execution in Florida"). By default, the dissenters' conclusions that violence and mutilation are inherent in the Florida electrocution procedure stand as the only judicial findings in the record on this point.[6]

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[6] *See Provenzano v. Moore*, slip op. at 43-44 (Shaw, J., dissenting) ("[n]ot only was every execution in Florida accompanied by the inevitable convulsing and burning that characterizes electrocution, but further, three executions in particular were marred by extraordinary violence and mutilation") (footnote omitted); *id.* at 52-53 (photographs of Davis "show a ghastly post-execution scene" which is "unquestionably violent"); *id.* at 53 ("[i]n even the 'successful' executions, the inmate was subjected to violence (i.e., the inmate was administered an electrical force that caused him to convulse

Those conclusions reflect the substantial evidence presented to the Florida courts on the subjects of the physical harrowing, degradation, and disfigurement worked by the Florida electrocution machinery. Witnesses to the electrocution process describe the condemned's body contracting forcefully and thrusting against the chair and straps when the electricity is engaged. Experts explain that this phenomenon results from electrical stimulation of muscle cells, causing the skeletal muscles to tetanize and pull against each other (R3.450, 573-75, 653-54). The same electrical effect paralyzes the respiratory muscles (R3.654). Post-electrocution examination shows characteristic physical deformations such as those seen in the following examples:

(1) Allen Davis' body displayed a halo of electrical burns on the scalp, burns on the right side of the face and above the eyebrow, an arcing burn on the lower abdomen or suprapubic region, a burn on the inner aspect of the right thigh, and a burn on the right calf (R3.740-41). The burns to his suprapubic region and inner right thigh were "full thickness burns," meaning that they extend all the way through the skin to the subcutaneous tissue (R3.756). These are "arcing burns" which occur when "the electricity comes out of the skin or travels in the subcutaneous tissues under the skin and is exited at that particular point and perhaps even re-enters the skin there" (R3.756).

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violently) and mutilation (i.e., the body of each inmate was burned on the head and leg as a result of the electrocution process)"); *id.* at 71 (Anstead, J., dissenting) ("electrocution always involves mutilation (within and without the body) and a substantial risk of malfunction (including external burning, bleeding, asphyxiation, etc.), as well as a culture of cruelty ('burn 'em,' 'fry 'em')"); *id.* at 81 (Pariente, J., dissenting) ("it is undisputed that despite all of the best efforts, electrocution will result in burning of parts of the body").

The headpiece sponge came down over Mr. Davis' forehead, causing burns, and below those burns are additional "drip burns" (R3.759, Pet. Ex. 1-H). "Drip burns" are not arcing but are "electrical burns associated with the saline in the sponge that is dripping down to the eyebrow" (R3.759).[7]

(2) Photographs of Leo Jones' body show a 3/8-inch deep wound in the top of the head, a wound on the right leg, a wound near the left temple, a swollen area on the back of the head, a chest puncture 1/8 of an inch in diameter, a severe burn from 1/8 to 1/4 of an inch deep going from the calf up to the knee, and a swollen area on the face (R3.135-38; Pet. Ex. 4). Up to 5:30 a.m. the morning of his 7:00 a.m. execution, Mr. Jones did not have these wounds on his body (R3.139, 150).

(3) Pedro Medina's autopsy revealed a "burn ring of the scalp with deposits of charred material," "a scald injury of the scalp and face" and a "circumferential" burn of the right calf (R1. V9. 78-79). Part of the scalp burn extended "full thickness through the scalp to the bone" (R2.915). From Medina's forehead down to his nose and cheeks, the skin was scalded from steam (*Id.* at 915-16).

D. THE RISK OF CONSCIOUS PAIN DURING ELECTROCUTION

The record presented to the Florida Supreme Court contains substantial evidence (including expert testimony) adduced by condemned persons to prove that electrocution under Florida's procedures involves the conscious experience of intense physical pain. The State's

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[7] In Mr. Davis' execution, the head sponge was "very wet" and a lot of water dripped on Mr. Davis' back and front (R3.321, 322-23). According to execution team members, the head sponge is supposed to be dripping wet (R1. V4. 45, 119; R3.1371).

sole rebuttal took the form of evidence (including expert testimony) aimed to prove that the application of electric current to an inmate under Florida's procedures inevitably causes instantaneous destruction of the brain's capacity to experience sensory stimulation (including pain). In this section, we summarize the evidence on both sides of this issue, for the purpose of showing that the record as a whole establishes the existence of a significant risk of conscious physical pain attending a Florida electrocution, and that the factual findings made on the point by the courts below fail to address all of the dimensions of this risk.

Experts presented by both parties in the *Jones* and *Provenzano* hearings agreed that the electrical activity of the brain during a judicial electrocution has never been measured and cannot be measured because the electrical current from the execution would obscure any measuring devices (R3.635, 637; R2.408, 677, 1038-39). The experts also agreed that no scientific experiments have been conducted applying 2300 volts – the maximum amount administered during Florida's electrocution procedure – to a human being (R2.422, 465, 711, 1038).[8] There are no published scientific studies regarding the path that electrical current follows through a person's body during a judicial electrocution (R2.476, 677, 705-06). No one knows how much current is necessary to instantly disable the brain because it is impossible to conduct such a study (R3.683; R2.711).

Experts for both parties also identified another area of inveterate uncertainty. They agreed that it is difficult to

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[8] Under the Florida procedure, electricity is supposed to be delivered to the condemned for 34 seconds. The circuitry is preset to deliver 2300 volts for 8 seconds, 1000 volts for 22 seconds and 2300 volts for 8 seconds (R1. V6. 209), but the last 8-second period is manually cut off after 4 seconds (R1. V4. 188).

determine from an external examination whether or not a person is conscious (R2.663, 1045). Patients who were believed to be unconscious from external examination are sometimes later able to recount details of their surroundings and events that occurred while they were thought to be unconscious (*Id.*). Autopsy cannot determine the moment a person became unconscious (R2.144, 1038).

On the subjects of consciousness and the risk of conscious pain, the condemned inmates presented the following experts: John Wikswo, Ph.D., who specializes in physics, biological physics, electromagnetics, biomedical engineering and electrophysiology (R3.611-12); J. Patrick Reilly, an expert in the effects of electricity on biological systems including the human body (R3.545); Orrin Devinsky, M.D., who specializes in neurology and clinical neurophysiology (R2.647); and Donald Price, Ph.D., a neurophysiologist (R3.406). Wikswo, Devinsky and Price testified that judicial electrocution is unlikely to result in instantaneous unconsciousness and is likely to result in extreme conscious pain. Reilly explained the fundamental background principles regarding the effect of electricity on biological tissues.

On these issues, the State presented the following experts: Kris Sperry, M.D., a forensic pathologist (R3.852); William Hamilton, M.D., a medical examiner (R3.1054); B. J. Wilder, M.D., a neurologist specializing in epilepsy (R3.1128); and Michael Morse, Ph.D., a biomedical engineer (R1. V7. 13).[9] These witnesses testified that judicial electrocution instantly disables the brain so that the condemned experiences no pain.

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[9] The State also presented emergency room physician Bullard, who had no opinion on the effects of electrocution on the brain (R3.1312), and cardiologist Goldman, who did not discuss the effects of electrocution on the brain (*See* R2.757-801).

1. Background data and scientific principles

a. The effects of electrical trauma on consciousness

Wikswo, Price and Devinsky recited case studies reported in the scientific literature regarding people who suffered high voltage electrical trauma, including head contact with high voltage, but retained consciousness during the event and were able to describe the pain they experienced (R3.639-45; J.A. 133-143; R2.352-53, 680-84). Wikswo's review of the literature indicates that "there is no single threshold [of current] for loss of consciousness" (R3.683). Devinsky described a patient whose head contacted over 3,000 volts, with the current exiting from his feet, but who "recalled a very painful sensation" (R2.678-80). Wilder agreed that victims of high voltage electrical accidents "are not necessarily rendered unconscious" and that victims of lightning strikes often describe feeling pain (R2.1043-44).[10] Other evidence bearing on the question whether the brain is instantly incapacitated by electricity includes reports about people who have undergone electroconvulsive therapy ["ECT"].[11] Devinsky and Price testified that patients who had undergone ECT before anesthesia was used were not rendered unconscious but reported painful experiences

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[10] Sperry described patients who touched a wire carrying 15,000 to 20,000 volts with their hands and suffered deforming burns of their hands and arms (R3.902-03). When they came into the emergency room, they were conscious (R3.903). They were alive when found and did not have to be resuscitated (R3.903).

[11] ECT is performed by placing two electrodes on the scalp, either on the temples or on the forehead and back of the head to try to direct the current directly across the brain (R2.685, 1001). ECT uses 120 to 150 volts (R2.684, 1000). Before 1960, no anesthesia was used during this procedure (R2.685).

(R2.356, 685-86). Morse agreed ECT patients report pain and discomfort (R1. V8. 56).

b. The amount of current reaching the brain

In lay terms, electricity generally follows the path offering the least resistance (R1. V8. 36). When a human body is part of the electrical circuit, as in a judicial electrocution, the body provides resistance (R2.551, 691). Body tissues have differing resistances and thus provide a variety of paths for electrical current to follow (R2.396, 439, 557, 689, 1016, 1022, 1028, 1192). Bone is among the most resistive body tissues, while blood vessels and muscles are among the least resistive and hence most highly conductive (R2.228, 396, 439-40, 691-92, 1036; R1. V8. 36-37, 44).[12] Thus, it cannot be assumed, simply because there are electrodes on the head and leg during a judicial electrocution, that the current follows the shortest path from the head to the leg. The brain is shielded from the current by the highly resistive skull and by highly conductive tissues such as the scalp outside the skull and the cerebral spinal fluid inside the skull (R2.430, 691-92; R3.434, 561-63, 567-69).[13]

Another important background principle in considering the physiological effects of electricity is that *current density*, rather than *current* alone, is associated with

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[12] Sperry recognized that current coming into the body through the head electrode would spread out and that the path the current would follow depends upon the resistance of body tissues (R3.895-97). Wilder and Morse agreed (R3.1179-80; R1. V7. 101, V8. 36-37).

[13] The burn ring on the head of an electrocuted person confirms that the skull is deflecting current (Wikswo 1997 report at 14-17). If the skull was not deflecting current and current was not therefore traveling towards the edge of the head sponge, the burn would be a solid disk rather than a ring (*Id.*).

degrees of tissue destruction (R3.560). High current density is more likely to cause physiological damage than low current density (R3.560-61). In a judicial electrocution, the current density at any one point in the body is less than the current coming in (R3.561-63), and current density will not be uniform throughout the body (R3.567).[14]

2. The debate over whether judicial electrocution produces instant unconsciousness, precluding conscious pain

a. The condemned inmates' witnesses

Because consciousness is not controlled by one particular area of the brain and because areas of the brain react differently to electrical current, Devinsky testified that it is not likely that judicial electrocution causes immediate unconsciousness (R2.661, 732). Price explained that regions controlling arousal and consciousness are located deep in the brain, removed from the source of the current, so the current density in those areas is likely to be less than in superficial areas (R2.385). Based upon behavioral, neurophysiological and anatomical evidence, Price testified that "it is highly, highly unlikely that the initial current surge [in a Florida judicial electrocution] would instantly and permanently . . . incapacitate the human brain" (R3.430; R2.385). Wikswo testified that "it may be possible for an inmate to maintain consciousness for 15 to 30 seconds into the execution" (R3.650).

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[14] Although no actual measurements have ever been made (R3.571), Reilly estimated that during a judicial electrocution the current density in the scalp will be about 50 times higher than that within the brain (R3.569-71).

In addition to the scientific evidence and principles discussed above, two categories of observations of judicially electrocuted persons indicate that unconsciousness is not likely instantaneous. First, witnesses regularly report that the condemned person exhibits breathing-like motions of the chest after the electricity stops. Numerous witnesses to the Davis execution reported that Mr. Davis' chest expanded two to four times over several minutes after the electricity stopped (R3.168, 201, 222, 228, 294, 303, 334, 708, 1027, 1041). One Davis witness, a prison employee who had attended more than 10 executions, saw that type of chest movement in several of them (R3.296). The phenomenon was reported in the Tafero execution (R3.43-44; Pet. Ex. 24, No. 40), the Medina execution (R3.83, 239-40; R1. V5. 106), and the Jones execution (R3.127-28).

The significance of the chest movements is that respiration is controlled by the brainstem (R2.70-72, 175-77, 696-97, 943-44, 957, 1011, 1029). Even respiratory movements which are not frequent or deep enough to take in oxygen effectively still indicate brainstem function (R2.72, 198, 733, 1011-12).[15] If the brainstem, which is part of the brain (R2.1063-64), retains some function after the electrocution cycle is complete, it follows that the person's whole brain was not instantly incapacitated at the beginning of the cycle (R3.627-29, 751; R2.189-90).[16]

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[15] Wilder agreed that breathing motions at the end of an electrocution could indicate a "firing of neurons" in the respiratory center of the brain stem (R3.1197). Sperry testified that such breathing motions "would mean that at least the brain stem still had some minimal functioning" (R3.999).

[16] Respiratory centers are located deep within the brain and are close to the deep pain centers (R3.440). Thus, if there is evidence of respiratory actions after an electrocution, it is likely

Second, sometimes the condemned has a palpable pulse after the electricity stops. When physician's assistant Mathews examined Pedro Medina after the execution, Mathews felt an agonal pulse or irregular beat in Mr. Medina's wrist (R3.1046). Mathews has attended about 30 executions, and it is not unusual to find such a pulse (R1. V5. 104). Mathews sometimes hears twelve to twenty-four erratic, irregular heartbeats after an execution (*Id.* at 113). With Mr. Medina, Mathews also heard irregular heart sounds with a stethoscope (*Id.* at 113, 116). Dr. Almojera, who approached Mr. Medina only after Mathews examined him for 3 to 5 minutes, heard "gurgling" sounds in Mr. Medina's chest indicating air and fluid moving (R1. V9. 128, 137).

The fact that the heart can continue to function after the cessation of the current also indicates that unconsciousness is not instant. A pulse can occur only if the heart is beating and pumping blood (R2.53, 174, 669, 783, 797, 1033). The heartbeat is created by regular electrical impulses flowing in the heart (R2.666, 764-67). Because both the heart and the brain rely on organized electrical chemical activity to function, the heart is a model of how electrocution affects the brain (R2.383). If the heart's operation is not immediately and totally stopped, there is no basis for saying the brain's operation is immediately and totally stopped (R2.382-84, 699, 212). In fact, the brain is more likely to continue functioning than the heart because the brain is protected by the skull which offers greater resistance to the current than the soft tissues and fluids surrounding the heart (R2.384, 699).

Based on the evidence and scientific principles described, Wikswo, Price and Devinsky concluded that

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that the pain centers in that area were not instantly and permanently destroyed (R3.440).

judicial electrocution is not instantly incapacitating (R3.430, 650; R2.376, 675). Thus, Price believed that "there is a very high likelihood that judicial electrocution . . . is excruciatingly, intensely painful and produces feelings of horror, dread and other negative experiences" (R2.352; R3.423). He explained that electrocution causes both direct and indirect pain: Direct pain results from the current activating particular areas of the brain, while indirect pain is caused by the current's effect on other bodily tissues such as stoppage of the heart, asphyxiation or the full contraction of skeletal muscles (R2.361, 379, 405; R3.424).

Devinsky agreed that judicial electrocution can cause conscious pain and suffering and that electrical current causes both spasmodic muscle contractions and repetitive activation of the brain's nerve cells (R2.676, 670). In addition, Devinsky testified, "for the electricity to get into the brain it has to pass through at least four pain sensitive structures, so one would expect there would have to be initial pain" before consciousness is lost (R2.699).

Wikswo explained that during the period of consciousness, the condemned will experience several kinds of pain (R3.653). All skeletal muscles will tetanize and pull against each other, causing intense pain (R3.653-54). The respiratory muscles are paralyzed, so blood levels of carbon dioxide rise quickly, creating a sense of suffocation (R3.654). The current will also directly stimulate pain centers of the brain so that the brain perceives pain elsewhere in the body, although the sensations are generated within the brain (R3.655).[17]

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[17] Price has made direct observations of this phenomenon when neurosurgeons or physiologists have placed electrodes deep in the brain and stimulated the brain with electricity (R3.426). Such a direct application of electricity to brain cells can

b. The State's witnesses

Sperry testified that a current level such as that applied to Allen Davis causes instant unconsciousness (R3.849-50), and that death occurs "within seconds as the brain is heated well above a temperature from which it cannot recover" (R3.851, 873-74). Wilder testified that current such as that in the Davis execution would cause unconsciousness in milliseconds (R3.1150-51) and disables structures deep in the brain, such as the brain stem (R3.1152). Wilder testified that within a few milliseconds, the person could not receive any sensation (R3.1152). Morse testified that Pedro Medina was rendered instantly unconscious and unable to feel pain (R1. V7. 16-17). He based this opinion on reports in the scientific literature that people who have survived electric shocks in the head have no recollection of pain (*Id.* at 105-06).[18]

Neither Morse nor Sperry was familiar with any instances of people having head contact with high voltage and retaining consciousness (R1. V8. 55-56, 57; R3.884-85). Wilder was aware that people have survived head contact with high voltage and have remembered

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cause the person to feel pain (R3.426). If an area of the brain responsible for perceiving pain is directly stimulated with electricity, the person will feel pain even if there is nothing causing a pain to the person's body (R3.435-37, 450). Wilder agreed that this phenomenon occurs (R3.1167-68).

[18] Hamilton believed that applying the current level used in the Davis execution through a current path from head to leg results in immediate loss of consciousness and death (R3.1079). In Hamilton's opinion, the current path was "from the top of the head through the brain, brain stem, through the center of the body, then exiting out through the electrode on the leg" (R3.1079-80). Hamilton believed that skin is the most resistant body tissue and did not know how bone "rates in body tissues as far as conductivity" (R3.1123).

these events (R3.1161-62). Regarding individuals who have reported retaining consciousness while contacting 100,000 volts, Wilder testified, "I think it is a discussion that you really – it is very difficult to pursue because you are talking about massive voltages and currents and you are trying to apply that to a normal physiological situation, and I can't do that" (R3.1173).

Wilder had not seen any information about judicial electrocutions in which the current cycle was completed, the person was seen moving, and the current cycle was then repeated (R3.1183). He believed information about breathing motions at the end of an electrocution "is not significant" (R3.1199). Sperry had no information about condemned people exhibiting chest movements after the current was turned off and thus could render no opinion about that (R3.998). Morse could not discuss the significance of breathing motions, as that was beyond his expertise (R1. V7. RVII. 112).

Sperry had not studied electricity (R3.893). Although he was of the view that a thermal effect disables the brain during electrocution, he had done no research into how fast the thermal effect occurs (R3.894). Sperry knew of no studies showing exactly how fast the temperature will rise in the brain during electrocution: "To my knowledge, no one's ever done that sort of research. No, I don't think you could" (R3.895). Sperry agreed that the thermal effect of current would depend upon the current density at any particular point (R3.1012). Sperry had no opinion about the minimum current required to disable the brain (R2.929, 955), did not know the resistance of the skull or how much current passes through the skull into the brain (R2.936), had no training in determining the path of electricity through the human body (R2.941), and had not studied the effects of electricity on the brain (R2.945).

Wilder testified that although studies have been done to determine how to guarantee a specific current pathway during electroconvulsive therapy, "you can't really guarantee a certain pathway" (R3.1189). In the case of current entering through the head electrode and sponge used in a Florida judicial electrocution, Wilder "would have no way of knowing" how much current went into each brain cell (R3.1179, 1182). Wilder was "not terribly familiar with" the concept of current density (R3.1178), was "certainly no expert in electrical phenomena" (R2.1012), did not have much expertise regarding the resistance of the skull (R2.1015), was not sure about the resistance levels of different types of bone (R2.1022), had not studied the path electrical current follows in the body (R2.1035), did not know the amount of current which reaches the cortex during a judicial electrocution (R2.1051), and did not know the amount of resistance the current must overcome before reaching the cortex (R2.1053).

In April 1997, Morse had not done any studies of the current path during a judicial electrocution (R1. V8. 38). He was "just starting into . . . the way current might distribute itself in an execution" and did not know the current path (*Id.* at 42, 58). In July 1997, Morse had done some "preliminary" work regarding the "nagging question" of "where the current goes when it leaves the head piece" in a judicial electrocution (R2.1145). Based on this "preliminary" model he concluded that the electrical current administered during a judicial electrocution instantly disables the brain (R2.1155).

E. PRE-ELECTROCUTION PAIN

In the Florida Supreme Court, Mr. Bryan argued that execution in Florida's electric chair involves an undue risk of painful asphyxiation because of the design of the

mouth strap and the manner in which it is affixed. In *Provenzano,* the trial court had made the findings summarized at pages 8-9 *supra* regarding the mouth strap, including findings that: (1) Davis' death "did not result from asphyxiation caused by the mouth strap"; (2) the mouth strap "may have caused Davis to suffer some discomfort," but not "unnecessary and wanton pain"; (3) execution "may involve some degree of pain" including pain from straps, but "any pain associated therewith is necessary" to ensure "the integrity of the execution process"; and (4) the use of a mouth strap "may be desirable, but "a smaller and/or redesigned mouth strap could accomplish the same purpose." (R3.2297-98). Noting the latter finding, the Florida Supreme Court majority said that "it may be appropriate for DOC to revisit . . . the use of the mouth strap," but the majority did not discuss whether there was a risk of pain associated with the present mouth strap or how much. *Provenzano,* slip op. at 5. The pertinent evidence is this:

1. How the mouth strap is designed and affixed

In Florida a condemned person's legs, arms, waist, chest and head are strapped to a wooden chair, and electrical circuitry is attached to the person's head and right calf. Since May, 1992, prison employees Thomas, McNeill and Hackle have been responsible for strapping the condemned to the chair and electrical circuitry (R3.306; 313; 345; 351). Each man determines how tight to affix the straps (R3.316). Thomas is supposed to affix the straps "[a]s tight as I can get them" (R3.316). McNeill makes sure the straps he affixes are "tight and snug" (R3.353-54).

Petitioner's Exhibit 5 in *Provenzano* is the mouth strap used in a series of executions, including Allen Davis'

(R3.316-17, 349, 830).[19] The mouth strap is "at least an eighth of an inch thick" (R3.1407), solid leather and covers the mouth, extending from the chin to the bottom of the nose (Pet. Ex. 1-I).[20] In Mr. Davis' execution, Hackle pulled the mouth strap "tight" (R3.318, 320). Before the mouth strap is applied, Warden Crosby asks the condemned for a last statement, because after the mouth strap is applied, the person is unable to speak (R3.1362-63).

The way the mouth strap was placed on Davis is the way it has been done in all other Florida executions (R3.340).[21] The State stipulated that the mouth straps used in other executions were the "same in design, purpose and function" as that used on Davis (R3.74, 86-87). Thomas agreed with the court that the mouth strap was

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[19] Witnesses have referred to Petitioner's Exhibit 5 as either the mouthpiece, mouth strap or chin strap. To avoid confusion, this device will be referred to in this brief as the mouth strap.

[20] *See Provenzano*, slip op. at 48 (Shaw, J., dissenting) ("[W]hen Davis was being strapped into the chair, guards placed a solid leather mouth-strap across his mouth and nose area. This mouth-strap is wide – approximately five inches from top to bottom – and it covered the entire lower portion of Davis' face from the bottom of his chin to immediately below his nose. The strap was fastened so tightly against his face and was so wide that it pushed his nose severely upward, blocking his nostrils at least partially. A heavy fabric face-mask was placed on top of this apparatus, further occluding his airway. And then . . . blood began flowing from his nose prior to electrocution. This too obstructed his nostrils.").

[21] Walter Zant, former Georgia death row warden, testified that in Georgia a condemned person's head is affixed to the electric chair by means of a chin strap similar to that found on a football helmet (R3.1292). This strap does not, like Florida's, cover the person's mouth, and it does not obstruct the person's ability to breathe (R3.1299, 1303).

tightened as in Petitioner's Ex. 1-I, which shows "the mask covering his mouth is so tight against, it's pushing the nose up to the side, and the blood is then coming directly down on the strap" (R3.328). The autopsy reports on the deaths of Jesse Tafero and Theodore Bundy note the presence of strap mark impressions on the face and ankles (R3.1852, 2017, 2019).

After the mouth strap is in place, the headpiece is put on (R3.320; Pet. Ex. 7).[22] The headpiece mask covers the condemned's face as soon as the device is put on the head, so when its chin strap is being tightened and thereafter, no one but Thomas can see the condemned's face (R3.354, 360, 819, 834, 838, 1033). The chin strap of the headpiece is positioned and tightened on top of the previously attached mouth strap (R3.834, Pet. Ex. 1). Thus, tightening this chin strap affects the tightness and position of the mouth strap (R3. Pet. Ex. 1). Thomas fastens this chin strap "tight" (R3.323). According to Crosby, the chin strap is to be pulled "snug," but he "would not expect it to be pulled as tight as it could be pulled" (R3.1365): "If you pull that thing as hard as you could, you're liable to choke him or break his jaw or something" (R3.1366).

Between the time when the mouth strap was secured to Mr. Davis and the tightening of the chin strap, ten to twenty seconds elapsed (R3.324). After the chin strap is tightened, Hackle attaches the electrical circuitry to the headpiece (R3.325). This took about twenty seconds in Mr. Davis' execution (R3.325).

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[22] The headpiece consists of the head electrode, a fabric mask which conceals the condemned person's face, and a chin strap (*See* R3. Pet. Ex. 7).

John Moser watched the clock in the execution chamber as the Davis execution progressed (R3.153-54). When all the apparatus had been affixed, the clock showed 7:05 (R3.162). There was a lull in activity; then at 7:10, Davis' body tensed (R3.162). Closer to 7:10 than to 7:05, Moser heard "two distinct . . . screams" from Davis (R3.162-63).

Thomas noticed blood coming from Davis' left nostril before the current was turned on (R3.326-27, 332). Thomas did not alert anyone that Davis was bleeding (R3.329-30). Victor Seryutin, the attending physician at the Davis execution, has attended five or six executions (R3.297-98). His responsibility at an execution is solely to certify death (R3.298; *see also* R3.1368). When he saw Davis bleeding after the electricity was engaged, Seryutin had no responsibility to take any action to stop the execution or to treat Davis (R3.298). Seryutin believed the bleeding was caused by the tightness of the mouth strap breaking small blood vessels or by Davis struggling to breathe (R3.299-300).

2. The risk of pain from the mouth strap

Provenzano's witness Robert Kirschner, a forensic pathologist, performed an autopsy on Allen Davis (R3.733). The examination disclosed petechial hemorrhages, which are "small pinpoint bleeding sites or hemorrhages that were present around the eyes, on the eyelids and . . . in the eye on the sclera" (R3.741, 742-43). Such hemorrhages "are frequently associated with asphyxiation" (R3.741, 743-44), which results from "lack of oxygen, either due to inability to breathe or to some obstruction of the airways, either externally or internally" (R3.741).

Based upon the position of the mouth strap pushing against Mr. Davis' nose and occluding his mouth and

upon the presence of petechial hemorrhages, Kirschner formed the opinion that Davis was suffering partial asphyxiation before current was applied (R3.747-48, 752) and that Davis "was suffering from conscious pain during that period of asphyxiation, the pain being that of air hunger, which is a very powerful reflex, and a feeling of suffocation is what is occurring" (R3.758).[23]

In rebuttal, Respondent presented Kris Sperry, a forensic pathologist who observed Kirschner's autopsy of Davis (R3.852). Sperry and Kirschner agreed that the bleeding came from the left nasal cavity (R3.857). Sperry did not dispute that petechiae were present in the numbers and distribution Kirschner described (R3.918), and he agreed that photographs of Davis show congestion on his face, chin and neck (R3.866-67). (Congestion means that the blood vessels are filled with blood (R3.866), and does not occur after death (R3.867).[24]) Sperry explained the congestion as resulting from Davis holding his breath (R3.927-28, 989): "obviously with the mouth strap on, he could not breathe through his mouth, but the nostrils are unoccluded" (R3.994; *see* Pet. Ex.

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[23] Rabbani Muhammed witnessed the 1998 execution of Leo Jones (R3.111-12). The mouth strap applied to Jones was similar to the one used in the Davis execution. (R3.114). In Jones' case the strap was "tied very tightly. I could see his – the flesh bulge from the tightness of the strap" (R3.117). Muhammed had earlier instructed Jones to signal if he could not breathe (R3.118-19). After all the apparatus was applied, Muhammed saw Jones moving his pinky finger up and down, which indicated to Muhammed that Jones was unable to breathe (R3.120, 142-43).

[24] Respondent's witness William Hamilton, a forensic pathologist who also performed an autopsy on Davis, believed the electric current caused the nose bleed (R3.1076, 1118).

1-I).[25] Sperry could not say to what extent the mouth strap might have caused pain or discomfort (R3.995).

Donald Price, the neurophysiologist and psychologist mentioned earlier, testified that, in his opinion, Davis did experience pain before the application of the electric current. In Price's field, scientists have developed a system of measuring the severity of pain by looking at facial expression and have determined that facial expressions of pain are distinct from facial expressions of other emotions (R3.454, 464).[26] Price testified that photographs of Davis show facial expressions which are "distinct signs of pain" (R3.456-57; Pet. Ex. 1-I, 1-F, 1-H, 1-G, 1-E), in that Davis' eyelids and the muscles around the eyelids are tightened, the cheek area below his eyelids is elevated, the muscles at the top of his nose between the eyes are wrinkled, his jaw has dropped, and it is likely his mouth is open (R3.458). Price concluded that Davis "almost certainly experienced intense or severe pain" (R3.466), resulting either from the straps or the effects of electricity (R3.424).[27]

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[25] The court pointed out to Sperry that photographs show the mouth strap is "pushing up under the nose to the point that the nose is crimped up in there, plus the chin strap is in place. It shows the blood bleeding straight down on top of the strap under his nose" (R3.1004). Sperry testified that the position of the strap and the fact that the blood came down over the strap had no significance "[a]s far as the bleeding being caused by the placement of that strap" but that the bleeding was "spontaneous" (R3.1004-06).

[26] Particular facial motions indicating pain are: a tightening of the eyes, an elevation of the cheek area, a wrinkling of the muscles at the top of the nose between the two eyes, a downward turn of the mouth, and a dropping of the jaw or mouth opening (R3.454-55).

[27] The State presented no rebuttal to Price's testimony on the facial expressions of pain. As noted above, the findings of

SUMMARY OF THE ARGUMENT

This Court has held repeatedly that the Eighth Amendment's prohibition of Cruel and Unusual Punishments must be interpreted in the light of contemporary knowledge, considering currently available alternatives, and respecting society's evolving standards of decency. It has also held that the Eighth Amendment requires that a state's procedures for inflicting the death penalty must be reasonably regulated to avoid unnecessary and unacceptable degrees of risk that the penalty will be applied in disregard of basic human dignity.

The constitutional analysis conducted by a majority of the state supreme court in upholding Florida's electrocution procedures deviates from these Eighth Amendment principles in several crucial regards. The Florida Supreme Court majority did not consider whether the procedure, on the evidence developed in this record, creates a continuing, uncontrollable risk of physical pain which is intolerable to contemporary standards of decency. Plainly it does, in a time when the alternative of lethal injection has become available and widely used – and when, indeed, all but four of the twenty-six state jurisdictions that at one time used electrocution as their only mode of execution have abandoned that practice. The Florida Supreme Court majority also put wholly out of account the psychological torment, agonizing uncertainty, and barbaric disfigurement of its electrocution procedure, all of which profoundly offend the core values of the Eighth Amendment.

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the trial judge were that Mr. Davis did not *die* of asphyxiation, and that he died instantaneously *once the current was applied.*

ARGUMENT

A. INTRODUCTION: THE GOVERNING EIGHTH AMENDMENT STANDARDS

"At the beginning of the nineteenth century . . . , the great spectacle of physical punishment disappeared; the tortured body was avoided; the theatrical representation of pain was excluded from punishment."[28] This case involves a reversion to the penal style of the preceding era, the epoque of "torture as a public spectacle."[29] It therefore implicates the original concerns of the Cruel and Unusual Punishments Clause.[30]

But the Eighth Amendment "proscribes more than physically barbarous punishments." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). It prohibits punishments that "involve the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). "Among 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.' " *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Gregg*, 428 U.S. at 183; citing *Gamble*, 429 U.S. at 103).

The pain inflicted need not be physical. The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict[ ] bodily pain or mutilation." *Weems v. United States*, 217 U.S. 349, 373 (1910). It forbids

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[28] MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 14 (Alan Sheridan trans., Vintage Books 2d ed. 1995).

[29] *Id.* at 7. *See also* R. J. EVANS, *RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY 1600-1987* (Oxford University Press 1996).

[30] *See, e.g.*, A. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839 (1969); R. Durham, *THE CRUEL AND UNUSUAL PUNISHMENT AND EXCESSIVE FINES CLAUSES*, 26 AM. CRIM. L. REV. 1617 (1989).

laws subjecting a person to "circumstance[s] of degradation," *id.* at 366,[31] or to "circumstances of *terror*, pain, *or disgrace*" "superadded" to a sentence of death. *Id.* at 370 (emphasis supplied).[32] *See also Trop v. Dulles*, 356 U.S. 86, 101-102 (1958) (condemning punitive denationalization: "There may be involved no physical mistreatment, no primitive torture," but the destruction of political existence entailing a "fate of ever-increasing fear and distress" offends the Amendment).[33]

"[T]his Court has 'not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner.' " *Stanford v. Kentucky*, 492

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[31] *See also Hudson v. McMillian*, 503 U.S. 1, 26 (1992) ("That is not to say that the injury [violating the Eighth Amendment] must be, or always will be, physical.") (Thomas, J., dissenting).

[32] *Cf. In re Medley*, 134 U.S. 160, 171, 172 (1890) (seclusion in solitary confinement and prohibition on telling condemned prisoner date and time of his execution are increased punishments, in violation of *ex post facto* clause, because solitary induces "further terror," while "secrecy [about the time of execution] must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment.").

[33] *See Hudson v. McMillian*, 503 U.S. 1, 16-17 (1992) (Blackmun, J., concurring): "As the Court makes clear, the Eighth Amendment prohibits the unnecessary and wanton infliction of 'pain,' rather than 'injury.' . . . 'Pain' in its ordinary meaning surely includes a notion of psychological harm. . . . I have no doubt that to read a 'physical pain' or 'physical injury' requirement into the Eighth Amendment would be no less pernicious and without foundation than the 'significant injury' requirement we reject today."

U.S. 361, 369 (1989) (quoting *Gregg*, 428 U.S. at 171).[34] Eighth Amendment adjudication is "dynamic" in three important senses. *First*, the punishment must be judged "in light of contemporary human knowledge." *Robinson v. California*, 370 U.S. 660, 666 (1962).[35] *Second*, the cruelty and gratuity of a mode of punishment must be judged in comparison to *currently* available alternatives. *Furman v. Georgia*, 408 U.S. 238, 430 (1972) (Powell, J., dissenting) ("[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.") *Third*, assessments of what is "cruel" and "unusual" must necessarily refer to the "evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. Thus, punishments "that transgress today's ' "broad and idealistic concepts of dignity, civilized standards, humanity, and decency" ' " violate the Amendment. *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (quoting *Gamble*, 429 U.S. at 102, quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)). This is why the Court has invalidated punishments repudiated by contemporary perceptions of

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[34] "But surely they [the framers of the Eighth Amendment] intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation." *Weems*, 217 U.S. at 372.

[35] As Justice Souter stated in his opinion respecting the denial of certiorari in *Poyner v. Murray*, 508 U.S. 931 (1993), "the holding [in *Kemmler*] does not constitute a dispositive response to litigation of the issue [of the constitutionality of electrocution] in light of modern knowledge about the methods of execution."

appropriate proportion, as reflected by objective indicia[36] such as the consensus of considered American legislative judgment. *See, e.g., Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982). "But . . . public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty must also accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' " *Gregg*, 428 U.S. at 173 (citing *Trop*, 356 U.S. at 100).

Since *Furman v. Georgia*, 408 U.S. 238 (1972), this Court has repeatedly applied these principles to state-created systems for administering the punishment of death. It has found the death penalty *per se* constitutionally unobjectionable, but has insisted that the procedures for inflicting it be reasonably regulated with an eye to controlling against unacceptable degrees of risk that the penalty will be applied in disregard of basic human dignity. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (speaking of the "risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty" and holding that "such risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (speaking of the "risk of an unwarranted conviction" and holding that "[s]uch a risk cannot be tolerated in a case in which the defendant's life is at stake"). In capital cases as in others, the teaching of the Court's cases is that Eighth Amendment adjudication cannot proceed primarily by correcting ugly but isolated

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[36] *See Stanford*, 492 U.S. at 370; *Ford v. Wainwright*, 477 U.S. 399, 408-410 (1986); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

instances of deviation from generally acceptable standards of procedure; rather, it must be concerned with assuring that general procedures themselves are adequately designed and maintained to avoid undue risks of inflicting inhumane punishments. *Compare Maynard v. Cartwright*, 486 U.S. 356 (1988), *with Lewis v. Jeffers*, 497 U.S. 764 (1990).[37]

B. THE FLORIDA SUPREME COURT HAS DISREGARDED PROPER EIGHTH AMENDMENT ANALYSIS AND AN INTOLERABLE RISK OF PHYSICAL PAIN

The *per curiam* majority opinion upholding Florida's electrocution procedure in *Provenzano* nowhere addresses the constitutionally critical question whether that procedure involves an unacceptable, needless *risk* of physically painful death. It recites that "[t]he record in this case reveals abundant evidence that execution by electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain." *Provenzano v. Moore*, slip op. at 3-4. But it does not mention that the record also contains abundant evidence to the contrary – evidence that an inmate can suffer intense pain before unconsciousness occurs (*see* pages 15-24 *supra*) – and it does not explain how or why or by what measure the former evidence is to be regarded as more satisfying than the latter. It refers only to Florida's customary "competent, substantial evidence" standard for appellate review

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[37] *Accord*: *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (Eighth Amendment analysis "requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency"); *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (the focus of the inquiry is whether there exists an "objectively intolerable risk of harm").

of findings of historical fact, slip op. 4, a reference that is wide of the constitutional mark for two related reasons. *First*, the pertinent Eighth Amendment question is not one of historical fact (what happened on a specific occasion) or even of simple actuarial probability ("a scientific and statistical inquiry into the . . . likelihood that . . . injury . . . will actually be caused"); it is whether "society considers the risk . . . [of the injury] so grave that it violates contemporary standards of decency," *Helling v. McKinney*, 509 U.S. 25, 36 (1993). *Second*, the trial court in *Provenzano* made no factual findings except about what happened on the single occasion of Allen Davis' execution, and it made those findings "by the greater weight of the evidence." (R3.2297).[38] To say that there was competent, substantial evidence to support a finding that (more

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[38] The trial court made six factual findings relating to the Davis execution: that, on that occasion, (1) the electric chair functioned as it was supposed to function; (2) DOC protocol was followed; (3) Davis's "death . . . did not result from asphyxiation caused by the mouth strap"; (4) Davis "did not suffer any conscious pain" but "suffered instantaneous and painless death once the current was applied to him"; (5) his nose bleed was of unknown origin but started before the electric current; and (6) the mouth and chin straps "may have caused Davis to suffer some discomfort" but not "unnecessary and wanton pain" (and "the mouth strap was not a part of the electrical operation of the electric chair."). It made a seventh finding that a different sort of mouth strap might be preferable; and an eighth finding as follows: "Execution inherently involves fear, and it may involve some degree of pain. That pain may include pain associated with affixing straps around the head and body to secure the head and body [to] the electric chair. However, any pain associated therewith is necessary to ensure that the integrity of the execution process is maintained." *State v. Provenzano*, slip op. at 32, quoted in *Provenzano v. Moore*, slip op. at 2-3.

probably than not) the application of electric current to Allen Davis on July 8, 1999 killed him instantly and without conscious physical pain falls far short of addressing the question whether electrocution – which passes through different human bodies differently on different occasions (*see* pages 18-20 and n. 12 *supra*) – poses a risk of physical pain that "violates contemporary standards of decency."[39]

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[39] In the earlier *Jones* hearing, the trial court made findings of fact – also based on "the greater weight of the evidence," (R2.1947) – that centered on the execution of Pedro Medina and the DOC's then-new electrocution protocol. It found that, despite the "malfunction[ ]" which occurred during Mr. Medina's execution, he "suffered no conscious pain"; that the same "can be said" for all future inmates who would be executed in Florida; that "Florida's electric chair – its apparatus, equipment, and electric circuitry – is in excellent condition"; that the "death chamber staff is qualified and competent to carry out executions"; that the new protocol for future executions would insure that "all executions in the electric chair will be carried out with the reasonable certainty of no future malfunctions"; and that "[a]ll inmates who will hereafter be executed in Florida's electric chair will suffer no conscious pain". *See Jones v. State*, 701 So. 2d at 77. The trial court's understanding of the scientific evidence presented in *Jones* was, however, so flawed on its face as to be patently unreliable. The court's holding that no conscious pain could be experienced relies in part on this explanation of how pain is experienced:

> "It is uncontroverted that the brain does not create pain impulses, but rather, pain impulses are created at the peripheral nerves. The pain message is transmitted through the nerves to the spinal cord and then to the brain, which then perceives the pain message."

(R2.1956). Nothing in the record supports this extraordinary notion, and the testimony of expert witnesses for both sides confirms the well-understood phenomenon that sensations of

It is not only this Court's precedents, of course, that make the crucial Eighth Amendment question whether "that risk is unacceptable," *Lockett*, 438 U.S. at 605. Since the effects of an electrocution upon human sensation cannot be measured during the event[40] or reported by the subjects afterwards, risk and its acceptability are the only questions that can meaningfully be asked about the use of such a procedure, however frequently repeated. The failure of the Florida Supreme Court to consider that question requires, at the least, a reversal and remand for reconsideration under the correct constitutional standard.[41] *See, e.g., Stansbury v. California*, 511 U.S. 318 (1994); *Sochor v. Florida*, 504 U.S. 527 (1992). But, on the present record, we believe that this Court should resolve the question independently, *see, e.g., Haynes v. Washington*, 373 U.S. 503 (1963), because there is only one answer to it that is consistent with contemporary standards of decency.

There was a time when the unmeasurable hazards of electrocution were thought to be bearable – and, indeed,

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pain *can* be produced by stimulating the regions of the brain which function to interpret pain. *See* pages 20-24 & n. 17 *supra* and the testimony of State's experts Wilder (R2.1019, 1034, 1046; R3.1167-1168) and Sperry (R2.951-953; R3.889-890, 892-893).

[40] *See* pages 15-16, *supra*.

[41] In his concurring opinion in *Provenzano*, slip op. at 10, Chief Justice Harding (joined by Justice Lewis) noted that "each time an execution is carried out, the courts wait in dread anticipation of some 'unforeseeable accident' " that will result in more litigation about the electric chair. Justice Quince, in her concurrence (joined by Justice Wells), observed that "human error . . . seems to plague this form of execution." *Id.* at 23. Yet none of the four justices considered these elements of risk in their analyses of whether electrocution was unconstitutionally cruel punishment.

a humane experiment – because of an apparent absence of alternatives. That was the view this Court took in *In re Kemmler*, 136 U.S. 436 (1890),[42] although *Kemmler*'s discussion of the subject was necessarily dictum because the Eighth Amendment was not then applicable to the States. Such a view was still tenable when the Court decided *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947), although that, too, was before the Eighth Amendment's incorporation into the Fourteenth.[43] But the advent of lethal injection – a mode of execution now used in the overwhelming majority of American jurisdictions that at one time used only electrocution – has made it unnecessary to tolerate the risks involved in discharging high-voltage electric current through the unpredictable pathways of the human body.[44] To continue to accept those risks, a gamble now deprived of any " 'legitimate penological objectiv[e],' " *Farmer v. Brennan*, 511 U.S. 825,

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[42] The Court in *Kemmler* quoted from a New York state legislative commission report describing electrocution as "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." *Id.* at 444.

[43] Justice Frankfurter's decisive vote in *Francis* was explicitly based upon the theory, later overthrown by *Robinson v. California*, 370 U.S. 660 (1962), that Eighth Amendment standards did not bind the States. *See* 329 U.S. at 470.

[44] *See* pages 17-27, *supra*. The evidence in this record is consistent with the professional literature in suggesting that – to an extent undreamed of in the *Kemmler* era – the human body may react to electrical current in ways that are designed to preserve life and consciousness, if only briefly, and that during that life-preserving biological reaction significant pain and suffering may be experienced. *See* the literature collected in D. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 William and Mary L. Rev. 551, 633-642 (1994).

833 (1994), is unconscionable. And to *compound* the risks, as Florida does, by strapping its condemned inmates to the chair in a fashion serving simply to add asphyxiation to the hazard, is a travesty of decency equalled solely, in this century, by the grotesque execution machine in Kafka's *In the Penal Colony*.

C. THE FLORIDA SUPREME COURT HAS DISREGARDED ITS OBLIGATION TO CONSIDER THE PSYCHOLOGICAL TORMENT, INDIGNITY AND BARBARIC DISFIGUREMENT INFLICTED BY ITS ELECTROCUTION PROCEDURE

By its orders limiting the scope of the evidentiary hearings conducted in the *Jones* and *Provenzano* cases and by the majority's single-minded focus upon physical pain in its ultimate *Provenzano* decision, the Florida Supreme Court excluded from its Eighth Amendment analysis three additional considerations that render Florida's electrocution procedure abhorrent to the Constitution:

1. Florida's procedure involves exquisite mental cruelty

It is difficult to imagine an execution procedure more dramatically designed than Florida's to deny condemned inmates death with dignity. The stark terror and incomprehensibility of the gruesome spectacles that have repeatedly occurred in Florida's electrocution chamber – and that have not ceased despite the sanguine finding of the trial court in *Jones* that "all executions in the electric chair will be carried out with the reasonable certainty of no future malfunctions"[45] – make it impossible for the condemned to invest his or her death with any shred of

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[45] *See* note 39 *supra*.

apperceptible meaning. That the most horrifying of the spectacles occur (or are reported) only irregularly does not make their apprehension easier to bear. *See* pages 14-15 *supra*; 49-51 *infra*.

Psychological science seconds the common sense human intuition that the anticipation of pain can exacerbate the suffering of pain.[46] Psychological understanding of the mechanisms people use to cope with the anticipation of death from illness[47] is instructive with respect to the experience of persons waiting to be executed by the state. It teaches us that condemned inmates like Anthony Bryan will attempt to prepare psychologically for their executions. They will attempt to make sense of their impending deaths; they will spend time contemplating what is about to happen, harnessing whatever psychological and emotional resources they have available to withstand the fate they know awaits them. Like others for whom death is imminent,[48] condemned inmates

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[46] A. Ploughaus, I. Tracey, S. Clare, *et al.*, *Dissociating Pain from its Anticipation in the Human Brain*, 284 SCIENCE (No. 5422) 1979 (1999). As one researcher has noted: "Even the suffering associated with losses from past events [emphasizes its anticipatory nature] . . . because the suffering person is forced to anticipate the effects of the losses on his or her present and future." W. Fordyce, *Pain and Suffering: A Reappraisal*, 43 AMER. PSYCHOLOGIST 276, 278 (1988).

[47] *See, e.g.*, E. Kubler-Ross, *ON DEATH AND DYING* (Macmillan 1969); E. Kubler-Ross, *The Languages of Dying Patients*, 10 HUMANITAS 5 (1974).

[48] *See, e.g.*, J. Arndt, J. Greenberg, S. Solomon, T. Pyszczynski & L. Simon, *Suppression, Accessibility of Death-Related Thoughts, and Cultural Worldview Defense: Exploring the Psychodynamics of Terror Management*, 73 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 5 (1997); T. Pyszczynski, J. Greenberg & S. Solomon, *A Dual Process Model of Defense Against Conscious*

experience anticipatory fear of dying, and this is an emotion that they struggle to overcome and manage.[49]

But Anthony Bryan and others condemned to death in Florida face more than simple pain and the loss of their lives. They face extinction by a process that is unpredictable and potentially painful, in which their bodies and particularly their faces and genitalia may be disfigured, and their deaths rendered a humiliating public spectacle. These aspects of the process by which they will die make their ability to cope with death overwhelmingly difficult – beyond the ordinary difficulty of facing death.

When one sits in a cell for years with little to occupy one's thoughts except to ready oneself for death, the manner of one's dying comes to have a special place in one's imagination. The essence of the Florida execution procedure, made notorious by repeated terrifying exhibitions, is to deprive the condemned man or woman of the capacity to hope that he or she can face what is to come with any solace of acceptance or redeeming courage.[50] Like raw physical pain, whose greatest horror is that it is mentally ungraspable, being put to death as Florida inflicts death is a prospect that cannot be made intelligible by the person who will suffer it. Demeaning and

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and Unconscious Death-Related Thoughts: An Extension of Terror Management Theory, 106 PSYCHOLOGICAL REVIEW 835 (1999).

[49] *See* C. Haney, *Psychological Secrecy and the Death Penalty: Observations on "The Mere Extinguishment of Life,"* 16 STUDIES IN LAW, POLITICS AND SOCIETY 3 (1996).

[50] As Ernest Becker observed in his classic work: "We admire the courage to face death; we give such valor our highest and most constant adoration; it moves us deeply in our hearts because we have doubts about how brave we ourselves would be." E. BECKER, *THE DENIAL OF DEATH* 11-12 (Free Press paperback ed. 1997)

repulsive, gratuitously hideous, it defies assimilation in any of the ways through which the human mind and will can make destruction bearable – by explaining it, or alleviating it, or dignifying it, or otherwise putting it into a coherent frame of reference that allows something of worth and value and *sense* to coexist with death and to survive despite it. The culminating insult is that all Florida inmates are required to be sane enough to contemplate what sanity can only gibber at.[51]

2. Florida's procedure adds the horror of uncertainty

One of the early purported advantages of using electrocution for state-sanctioned executions was its alleged reliability.[52] Reliability or predictability is an important dimension of humane treatment. Knowledge about the nature of the process by which death will come has been found to assist what therapists have described as the

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[51] *See Ford v. Wainwright*, 477 U.S. 399, 409 (1986): "[T]he natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today."

[52] The advantages of electrocution were said to be the reduction of suffering of the condemned, elimination of the unpredictability that sometimes accompanied the less effective and more inefficient method of execution then commonly in use (hanging), and – because of the promise of instantaneous and apparently painless death – a significant moderation in the spectacle of the execution itself. No less a scientific figure than Thomas Edison was called upon by New York to provide support for this untried method of execution, and he confidently opined that it "would kill instantly, painlessly, and in every case." Quoted in L. Hoffman, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 TEXAS L. REV. 1039, 1043 (1992).

"death anxiety"[53] or "terror management" that surrounds death by decreasing the profound fear that people associate with their impending demise.[54] Conversely, unpredictability and unreliability are hallmarks of cruel punishment. Introducing unpredictability into the process of administering pain is a favored practice of torturers who, by doing so, seek to intensify the fear their actions generate and the suffering it inflicts.[55] Thus, the unpredictability of events clearly adds to their painful quality.[56] A century's worth of experience with the electric chair, and not just the events of the last decade in

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[53] R.A. Neimeyer & D. Van Brunt, "Death Anxiety," in H. Wass, R. Neimeyer *et al.*, eds., *Dying: Facing the Facts* 49-88 (3d ed., Taylor and Francis 1995); R. Neimeyer, ed., *Death Anxiety Handbook: Research, Instrumentation, and Application* (Taylor and Francis 1994).

[54] C. Abengozar, B. Bueno & J. Vega, *Intervention on Attitudes toward Death along the Life Span*, 25 Educational Gerontology 435 (1999).

[55] *See, e.g.*, M. Basoglu & S. Mineka, "The Role of Uncontrollable and Unpredictable Stress in Post-traumatic Stress Responses in Torture Survivors," in *Torture and Its Consequences: Current Treatment Approaches* 182-225 (Cambridge University Press 1992). *And see* A. Koestler, *Darkness at Noon* (Macmillan 1941).

[56] *E.g.*, T. Pyszczynski, J. Greenberg, & S. Solomon, "A Terror Management Perspective on the Psychology of Control: Controlling the Uncontrollable," in M. Kofta, G. Weary, *et al.*, eds., *Personal Control in Action: Cognitive and Motivational Mechanisms* 85-108 (Plenum Press 1998); V. Florian & M. Mikulincer, *Fear of Death and the Judgment of Social Transgressions: A Multidimensional Test of Terror Management Theory*, 73 Journal of Personality and Social Psychology 369 (1997). Terror management is facilitated by the belief that future death-related events will be orderly and predictable. J. Lieberman, *Terror Management, Illusory Correlation, and Perceptions of Minority Groups*, 21 Basic and Applied Social Psychology 13 (1999).

Florida, suggests that it is fraught with uncertainty. As one historian recently concluded:

> "Many [executions by electrocution], like Kemmler's, were botched when the electrodes were not tight enough, when a sponge was allowed to dry out or even when the wires were installed incorrectly. In many of these cases the victim dies a slow and agonizing death rather than the quick and efficient 'electric euthanasia' the inventors of the electric chair had hoped to provide."[57]

As this Court recognized more than a hundred years ago, uncertainty about the time of one's execution "must be accompanied by an immense mental anxiety amounting to a great increase in punishment." *In re Medley*, 134 U.S. 160, 171, 172 (1890). Uncertainty as to whether one will die like Jesse Tafero or Pedro Medina or Allen Lee Davis is no less agonizing.

3. The prospect of disfigurement enhances the atrocity

Another supposed advantage of electrocution when it was introduced as a means of execution a century ago was that it seemed to offer a scientific solution to the problem of disfiguring spectacles that plagued beheading and hanging. A *New York Herald* editorial published in 1884 calling for an end to the gallows reflected this view: "Science stands ready to provide Justice with a number of perfectly expeditious, neat and non-disfiguring homicidal methods. It is quite easy to devise a plan by which the death of a murderer would be instantaneous, and into which neither the horrible nor the grotesque would

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[57] C. Brandon, *The Electric Chair: An Unnatural American History* 205 (McFarland Publishers 1999).

enter."[58] But that promise has not been fulfilled.[59] According to the Florida Department of Corrections, "most executions last longer than seven minutes." *Buenoano v. State*, 565 So. 2d 309, 311 (Fla. 1990). During those more than seven minutes of electrical current waxing and waning, of clenched muscles, chest movements and sometimes moans, smoke, flames or blood, the prisoner's death is rendered a grisly spectacle.[60]

Disfigurement is almost universally recognized as a form of profound degradation and humiliation.[61]

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[58] *New York Herald*, August 10, 1884, quoted in Brandon, note 58 *supra*, at 39.

[59] There is research suggesting that electrocution is perceived as the second most painful form of judicial execution, next only to stoning to death. M. Patarelli & J. Bishop, *Perceptions of Estimated Pain Experienced During Execution: Effects of Gender and Belief in Capital Punishment*, 38 Omega: Journal of Death and Dying 103 (1998-99).

[60] Across the country, news reports of recently botched executions in Florida have included accounts that witnesses were "sickened" by what they saw. *See, e.g., Grisly Execution in Electric Chair Sickens Witnesses, Flames Shoot from Convict's Head as Florida Murderer is Put to Death*, San Jose Mercury News 1A (March 26, 1997). Newspapers as far away as Ireland carried headlines like "Electric chair sparks another grisly scene" when they reported on the bloody execution of Allen Davis. David Sapsted, *Electric Chair Sparks Another Grisly Scene*, Irish Independent 28 (July 9, 1999).

[61] "When William Hogarth engraved, in 1751, the grim series entitled *The Four Stages of Cruelty*, he mapped the moral sequence that begins with boys tormenting animals and leads to rape and murder. In the final macabre image, *The Reward of Cruelty*, the perpetrator has finished up a ghastly shrieking corpse on a surgical dissection table, his innards rummaged by doctors and spilling in profusion on to the floor and into pails, his bones in the anatomist's cauldron, while on the operating theatre walls are suspended the skeletons of criminals who have

Disfigurement of the dead is condemned by virtually every culture.[62] It was a common-law crime and is now commonly punished by statute.[63] In times of political upheaval, opposing factions sometimes use disfigurement and mutilation of the dead to terrorize and humiliate their opponents. Conversely, most cultures have elaborate burial rituals that scrupulously provide for the careful preservation of the physical integrity of the dead. Preservation of the physical integrity of the dead is part of a deep-seated human need.[64] The threat of a disfiguring death instills intense distress.

Physical mutilation is cited among the atrocities forbidden in this Court's early cases. *See, e.g., Weems v. United States*, 217 U.S. at 372 ("there could be exercises of cruelty by laws other than those which inflicted bodily pain *or mutilation*"); *Wilkerson v. Utah*, 99 U.S. 130, 135 (1879) (citing drawing, beheading, quartering and public dissection as punishments forbidden by the Eighth Amendment). Indeed, the State conceded in the *Provenzano* case that death by guillotine would violate the Eighth Amendment, even though probably instantaneous and painless, because of its disfiguring of the executed

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preceded him under the scalpel." MARINA WARNER, *NO GO THE BOGEYMAN: SCARING, LULLING AND MAKING MOCK* 133-134 (Farrar, Strauss and Giroux 1998).

[62] *See generally* E. BENDANN, *DEATH CUSTOMS* 45-56, 83-89 (Knopf 1930) (comparing several cultures' attitudes and practices regarding death).

[63] *See* John S. Herbrand, *Validity, Construction, and Application of Statutes Making It A Criminal Offense to Mistreat or Wrongfully Dispose of Dead Body*, 81 A.L.R. 3d 1071 (1977).

[64] This is why the disinterment and dissection of corpses has been a constant subject of horror and a staple of classic horror tales like Robert Louis Stevenson's *The Body Snatcher*.

person. *Provenzano v. Moore*, slip op. at 79 (Pariente, J., dissenting).

Disfigurement and degradation are abhorred, moreover, because they represent ancient forms of power in which one's body was not one's own, but belonged to the "divine" King to dispose of at his whim.[65] It was in part in reaction to this limitless power of the Sovereign to trespass on an individual's right to his or her own bodily integrity that prohibitions against cruel and unusual punishment were erected. These prohibitions stand to limit not only government's power to inflict pain, but government's power to deform the very physical being of its citizens. That is why, among the "rules of government which . . . have [been] found to be essential to the preservation of those great principles of liberty and law . . . was that which prohibited the infliction of cruel and unusual punishment." *Weems*, 217 U.S. at 367-368.

4. Florida's method of electrocution is an atavistic barbarism

Kemmler gave the States 100 years to experiment with methods of conducting executions by electrocution. Untried when *Kemmler* was decided in 1890, electrocution subsequently came to be the only mode of execution used in more than half the States of the United States. That number now has dwindled from 26 to 4, not by happenstance but through humanity. Not a single jurisdiction in the world outside of the United States practices judicial electrocution. Yet in the State of Florida it continues to be practiced under circumstances that increase its visible

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[65] *See* M. FOUCAULT, *op. cit. supra* note 28.

brutality. So practiced, it is a gratuitous affront to universal standards of contemporary decency and violates the Eighth Amendment.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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